Supreme Court, U.S.
FILED
APR 6 2001
CLERK

No. 00-1170

IN THE

Supreme Court of the United States

ROBERT C. HORNKOHL, in his official capacity as Director of Public Safety for City of Manistee and CITY OF MANISTEE,

Petitioners,

v.

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT COUNTY OF MANISTEE

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QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment imposes a constitutional duty on the state to provide timely rescue when it restricts private rescue efforts?

PARTIES TO PROCEEDINGS

COUNTY OF MANISTEE AND SHERIFF HAIK

The County of Manistee and its sheriff, Edward Haik, were co-defendants of petitioners in this case. The Court of Appeals affirmed the District Court's grant of summary judgment to Sheriff Haik on grounds of qualified immunity. The Court, however, reversed summary judgment for the County. Although the County has not sought a review of the Court of Appeals' decision, any legal ruling by this Court will affect the outcome of the case against the County.

PETITIONERS

The Petitioners are the City of Manistee and its Director of Public Safety, Robert C. Hornkohl. They were Defendants in this case.

RESPONDENT

Respondent, Galen Beck, is the Personal Representative of the Estate of Eugene Beck and was a Plaintiff in this case.

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STATEMENT OF THE CASE

The County of Manistee incorporates by reference thereto, the Statement of the Case contained in the Brief of the Petitioners.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT IMPOSE A DUTY ON THE STATE TO PROVIDE TIMELY RESCUE WHEN IT RESTRICTS PRIVATE RESCUE EFFORTS.

To prevail in an action brought under 42 U.S.C. § 1983, a plaintiff must show that he or she was deprived of a right secured by the Constitution or laws of the United States by a person acting under the color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In addition, when a § 1983 claim is asserted against a municipality, the plaintiff must prove that (1) the harm was caused by a constitutional violation and (2) the municipality is responsible for that violation through official municipal policy or unofficial custom or practice. *Collins v. City of Harker Heights, Tex*, 503 U.S. 115, 120-21, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

In this case, Plaintiff's claim is predicated upon the substantive component of the due process clause that protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Plaintiff's Complaint alleged that Sheriff Haik, acting with final responsibility for the

county, adopted a de facto policy of preventing private rescues of drowning persons while failing to provide meaningful alternatives. (R. 34, Amended Complaint, & 25.) Reduced to its essence, the Plaintiff's Complaint asserts that because the county restricts private rescue efforts, the due process clause imposes a duty on the county to provide rescue services.

This court defined the duty imposed by the due process clause of the Fourteenth Amendment in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 988 (1989). In *DeShaney*, the court held that the state has no duty to provide protective services to its citizens. However, this court recognized a duty to protect in limited circumstances, i.e. when the state takes persons into its custody or restrains them from acting on their own behalf. The court in *DeShaney* explained that when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the due process clause. 489 U.S. at 200. Thus, pursuant to *DeShaney*, some sort of confinement of the injured party — incarceration, institutionalization, or the like — is needed to trigger the affirmative constitutional duty.

In an attempt to avoid the strict limitation imposed on the state's duty to act under *DeShaney*, the Respondents argue that they do not claim a failure to rescue or protect, rather they "complain about the express policies of the city and county which affirmatively prevented the rescue which would have taken place without governmental interference." (Brief in Opposition to Petition for Writ of Certiorari, p. 18.)

The Sixth Circuit agreed with the Respondents and recognized a duty by the government to provide rescue services when it restricts private rescue efforts. The Sixth Circuit found support for its decision in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). In *Ross*, the Complaint alleged that a 12-year-old boy fell off a breakwater into Lake Michigan. Although two nearby scuba diving private citizens offered to help save him, a deputy sheriff, acting pursuant to county policy, ordered them to stop their rescue efforts, threatened to arrest them if they persisted, and even positioned his boat so as to prevent their dive. Twenty minutes after the initial rescuers arrived, the officially-authorized divers recovered the boy's body. Concluding that the plaintiff stated a cognizable § 1983 claim, the Seventh Circuit noted that if the allegations of the Complaint are true, "the County had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative."

The Sixth Circuit and the *Ross* court clearly recognized a broader constitutional duty than that contemplated by *DeShaney*. The Courts and commentators have indicated that the Supreme Court intended that only relationships that created a duty to act are those involving custody and complete restraint of the individual's liberty. An article in the *Harvard Law Review* observed:

> The *Ross* court moved beyond *DeShaney*'s analytical framework to focus on the requirement that government "provide a meaningful alternative" when it "cuts off private sources of rescue." By implicitly reopening the *DeShaney* debate over "special relationships" between the state and an individual that may create an

> obligation for the state to act, the Seventh Circuit indicated its willingness to recognize a sphere of state responsibility larger than that envisioned by *DeShaney*.
>
> The special relationship doctrine delineates situations in which the government becomes obligated to protect an individual or to provide services because of the effect of previous government action. In *DeShaney*, Chief Justice Renquist defined narrowly the range of government action that may give rise to a special relationship. According to him, the only relationships that create a duty to protect are those involving forced physical custody and complete restraint of the individual's liberty; inmates and involuntarily committed psychiatric patients have some guarantees.
>
> *Recent development: Fourteenth Amendment — State Action — Seventh Circuit Recognizes a Broader State's Duty to Act, 104 Harv. L. Rev. 1146 (1991).*

The Fourth Circuit in *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), similarly stated:

> This court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the due process clause. *See, e.g., Rowland*, 41 F.3d at 174-75 (Noting that when the state has not restricted one's ability to care for oneself, the rationale for an affirmative duty falls away); *Piechowicz v. United States*, 885

> F.2d 1207, 1215 (4th Cir. 1989) (Holding that "substantive due process protects the liberty interest only of persons affirmatively restrained by the United States from acting on their own behalf"). *Id.* at 1175.

In this case, since Eugene Beck's liberty was not restrained in any way by the government, the imposition of any duty to provide rescue services ("meaningful alternative") based on alleged interference with private rescue efforts is not supported by the due process clause. At most, the County's alleged interference with or prevention of private rescue may trigger a duty under tort law, but will not create a constitutional duty to provide rescue services.

The Restatement 2d of Torts § 326 "intentionally preventing assistance" provides:

> One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.

Restatement 2d of Torts § 327 "negligently preventing assistance" also states:

> One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by absence of the aid which he has prevented the third person from giving.

Thus, it is clear from the above provisions of the *Restatement Torts* that Plaintiff's claim is the kind of tort law that this court has refused to translate into a due process deprivation. *See Daniels, supra.*

The Sixth Circuit's decision runs counter to this court's admonition that the federal courts should exercise caution and restraint in recognizing new rights under the due process clause. *See Collins, supra.*

Additionally, the Respondents seek to justify the Sixth Circuit's decision under the state-created danger theory. Despite the narrow scope of duty recognized in *DeShaney*, the lower courts have seized upon a comment made in that case as support for carving out an exception based on state-created danger theory. The *DeShaney* court stated in dicta that "while the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them." Based on this dicta, the lower courts have recognized a constitutional duty to protect an individual against private violence in a non-custodial setting if the state takes affirmative action which increases the individual's danger of, or vulnerability to danger. *Kallstrom v. City of Columbus,* 136 F.3d 1055 (6th Cir. 1998).

Several circuits have, however, questioned whether the Supreme Court gave approval to the state-created danger theory in the oft-cited dicta. In *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir. 1994), the Fifth Circuit stated:

> This court recently noted that no Fifth Circuit case has yet predicated relief on state-created danger theory. *Leffall* [*v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994] also questioned

> whether the Supreme Court voiced support for that theory of constitutional liability . . . *Leffall* suggested that the court was simply placing in context its broader ruling that the state had no affirmative duty to the young client of its welfare department. *Id.* at 201.

The Eighth Circuit in *Dorothy J v. Little Rock School District*, 7 F.2d 729 (8th Cir.) similarly stated:

> We cannot agree with those who have suggested that one comment toward the end of the *DeShaney* opinion — "nor did the state do anything to render him any more vulnerable to [the risk of private violence]." 489 U.S. at 201 — signals the Supreme Court's approval of §1983 liability whenever a state actor has increased the risk of harm from private sources. Such a ruling would make §1983 virtually coterminous with traditional tort law, the very expansion of constitutional tort liability that the Supreme Court has rejected . . . *Id.* at 734.

Even if the state-created danger theory is viable, it is inapplicable to this case because the real affirmative act that placed respondent's decedent in danger was the act of him jumping into the river. The County definitely played no part in causing him to fall into the river.

CONCLUSION

The Sixth Circuit's decision impermissibly expands the concept of substantive due process. The decision reflects a trend in the lower courts of whittling down *DeShaney*'s import. This court should grant certiorari to consider whether to limit the imposition of constitutional duty to instances of custody or involuntary confinement as in *DeShaney* or to extend the duty to any situation in which the state is alleged to have affirmatively acted to restrict private efforts to provide aid, even though the state played no part in creating the danger in the first place. Due to the divergent interpretations of the *DeShaney* decision by the lower courts, it is important for this Court to provide guidance in this important area of constitutional law. Respondent County of Manistee supports and adopts the argument of petitioners.

Respectfully submitted,

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